Supreme Court, U.S.
FILED

941111 DEC 22 1994

OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States
October Term, 1994

Clinton Manges, Duval County Ranch Company, and Man-Gas Transmission Company, Debtors,

Petitioners,

vs.

Seattle-First National Bank and SeaFirst America Corporation,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Petition for Writ of Certiorari

Deirdre Ruckman
Stacy R. Obenhaus*
GARDERE & WYNNE, L.L.P.
3000 Thanksgiving Tower
Dallas, Texas 75201
(214) 999-3000

Attorneys for Petitioners
*Counsel of Record

QUESTIONS PRESENTED

This case arises from petitioners' challenge, based on this Court's decision in *Holywell Corp. v. Smith*, 112 S. Ct. 1021 (1992), to a bankruptcy court's order confirming a plan of reorganization. However, the question presented is whether the court of appeals improperly dismissed this appeal on the grounds that "substantial consummation" of the plan of reorganization had rendered the appeal moot. In particular, the following issues arise:

1. Did the court of appeals err in deciding that it could not grant relief by narrowly fashioning the relief granted, thereby avoiding wholesale revision of the plan?

2. Did the court of appeals err in refusing to remand the case for the limited purpose of allowing the petitioners to conduct discovery on the mootness issue?

3. Did the court of appeals' dismissal of this appeal on mootness grounds, despite petitioners' numerous, repeated requests for a stay, violate the due process principle of "fundamental fairness" as well as the "fresh start" policy of the Bankruptcy Code?

LIST OF PARTIES

The following is a list of all of the parties to the proceeding in the United States Court of Appeals for the Fifth Circuit, whose judgment is sought to be reviewed:

Petitioners:

Clinton Manges

Duval County Ranch Company

Man-Gas Transmission Company

Respondents:

Seattle-First National Bank

SeaFirst America Corporation

None of these parties has parent companies or subsidiaries within the meaning of Supreme Court Rule 29.1.

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

OPINIONS AND JUDGMENTS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT 8

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

A&S Liquidating Co. v. Carter, 465 F.2d 359 (5th Cir. 1972) 14

In re American Ready Mix, Inc. (Lopez v. Behles), 14 F.3d 1497 (10th Cir.), *cert. denied*, 115 S. Ct. 77 (1994) 13

In re AOV Indus., Inc., 792 F.2d 1140 (D.C. Cir.), *vacated in part*, 797 F.2d 1004 (D.C. Cir. 1986) 9, 15

In re A.J. Mackay Co. (Bill Roderick Distribution, Inc. v. A.J. Mackay Co.), 50 Bankr. 756 (D. Utah 1985) 11

In re Block Shim Dev. Co. (Ronit, Inc. v. Stemson Corp.), 939 F.2d 289 (5th Cir. 1991) 8, 15

Bolling v. Sharpe, 347 U.S. 497 (1954) 16

In re 1515 Broadway Assocs., L.P. (New York City Dep't of Fin. v. 1515 Broadway Assocs., L.P.), 153 Bankr. 400 (S.D.N.Y. 1993) 9

In re Chateaugay Corp. (Frito-Lay, Inc. v. LTV Steel Co.), 10 F.3d 944 (2nd Cir. 1993) 8

Church of Scientology v. United States, 113 S. Ct. 447 (1992) 9

Easley v. University of Mich. Bd. of Regents, 853 F.2d 1351 (6th Cir. 1988) 13

In re Grosso, 51 Bankr. 266 (Bankr. D.N.M. 1984) .. 17

In re Hamady Bros. Food Markets (Durant Enters., Inc. v. Creditors Comm.), 110 Bankr. 815 (E.D. Mich. 1990) 13

Holywell Corp. v. Smith, 911 F.2d 1539 (11th Cir. 1990), *rev'd* 112 S. Ct. 1021 (1992) 5

Holywell Corp. v. Smith, 112 S. Ct. 1021 (1992) ... 7, 10

Huddleston v. Nelson Bunker Hunt Trust Estate, 102 Bankr. 71 (N.D. Tex. 1989) 13

Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc., 768 F.2d 189 (7th Cir. 1985) 13

In re Manges (Manges v. Seattle-First Nat'l Bank), 29 F.3d 1034 (5th Cir. 1994) 7, 10

Peterson v. Garvey Elevators, Inc., 850 P.2d 893 (Kan. 1993) 16

In re Public Service Co. (Rochman v. Northeast Util. Serv. Group), 963 F.2d 469 (1st Cir.), *cert. denied*, 113 S. Ct. 304 (1992) 15

In re Riso (Snoke v. Riso), 978 F.2d 1151 (9th Cir. 1992) 17

In re Roberts Farms, Inc. (Trone v. Roberts Farms, Inc.), 652 F.2d 793 (9th Cir. 1981) 15

Southern Pac. Terminal Co. v. ICC, 219 U.S. 498 (1911) 16

In re Texaco Inc. (Trans World Airlines, Inc. v. Texaco Inc.), 92 Bankr. 38 (S.D.N.Y. 1988) 9, 15

In re UNR Indus., Inc., 20 F.3d 766 (7th Cir. 1994), *cert. denied sub nom. UNARCO Bloomington Factory Workers v. UNR Indus., Inc.*, 63 U.S.L.W. 3381 (Nov. 14, 1994) 9

Statutes

11 U.S.C.A. § 1127(b) (West 1993) 3

28 U.S.C.A. § 157 (West 1993) 2

28 U.S.C.A. § 1254(1) (West 1993) 2

No. _____

In the
Supreme Court of the United States
October Term, 1994

Clinton Manges, Duval County Ranch Company,
and Man-Gas Transmission Company, Debtors,

Petitioners,

vs.

Seattle-First National Bank and
SeaFirst American Corporation,

Respondents.

TO THE UNITED STATES SUPREME COURT:

Clinton Manges, Duval County Ranch Company, and Man-Gas Transmission Company ask this Court to issue a writ of certiorari to review the opinion issued August 29, 1994, by the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND JUDGMENTS BELOW

Petitioners have reproduced in a separate appendix the opinions and judgments which the courts below have issued. The opinions and judgments are as follows:

In re Manges (Manges v. Seattle-First National Bank), 29 F.3d 1034 (5th Cir. 1994) (decision of court of appeals on appeal from the district court).

Manges v. Seattle-First National Bank, No. C-91-208 (S.D. Tex. May 4, 1993) (decision of the district court on appeal from the bankruptcy court).

In re Duval County Ranch Co., No. 89-01286-C-11; No. 89-01532-C-11; No. 89-01531-C-11 (Bankr. S.D. Tex. June 10, 1991) (bankruptcy court order confirming plan).

JURISDICTION

Clinton Manges, Duval County Ranch Company, and Man-Gas Transmission Company each filed a petition for relief pursuant to chapter 11 of the United States Bankruptcy Code. The bankruptcy court had jurisdiction to entertain those petitions pursuant to 28 U.S.C.A. § 157 (West 1993).

The court of appeals issued its opinion on August 29, 1994. On September 27, 1994, the court of appeals denied the debtors' petition for rehearing. Pursuant to 28 U.S.C.A. § 1254(1) (West 1993), this Court has jurisdiction to review the decision of the court of appeals.

STATUTES INVOLVED

11 U.S.C.A. § 1127(b) (West 1993):

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

STATEMENT OF THE CASE

Duval County Ranch Company ("Ranch Company") owned the surface estate of a ranch in Duval County, Texas, and Man-Gas Transmission Company ("Man-Gas") owned the mineral estate. These two companies were wholly owned by Clinton Manges; Manges and these two companies were thus known as "the Manges debtors."

Seattle-First National Bank made a loan to the Ranch Company which was secured by a mortgage on the surface estate and was personally guaranteed by Manges. The loan went into default, and Seattle-First filed suit against Ranch Company and Manges. The parties settled the dispute by executing an agreed judgment pursuant to which Ranch Company and Manges were to make periodic payments on the loan. Manges and the Ranch Company failed to make one of the scheduled loan payments, and at that point Ranch Company filed a voluntary chapter 11 bankruptcy petition to prevent the foreclosure which the agreed judgment permitted. Soon thereafter, Manges and Man-Gas also filed chapter 11 proceedings.

The bankruptcy court lifted the automatic stay so as to allow the foreclosure, thereby facilitating a sale of the ranch estate to SeaFirst America Corporation, a wholly-owned subsidiary of Seattle-First. A U.S. district court issued an order confirming the sale under the foreclosure provisions of the agreed judgment.

Several times during the course of the bankruptcy proceedings, the Manges debtors proposed their own plan of reorganization. The bankruptcy court rejected each of these proposed plans, and so Seattle-First and SeaFirst ultimately proposed a plan highly favorable to them.

Under this creditors' plan, a liquidating trust would be created to acquire and hold legal title to the debtors' assets — principally the surface and mineral estate of the Duval County ranch property. The proceeds from the sale of these assets were to be distributed to various creditors, the primary beneficiaries of the trust being Seattle-First and SeaFirst. Seattle-First and SeaFirst were to set up a fund for satisfaction of the unsecured creditors.

Although SeaFirst had purchased the ranch property at the prior foreclosure, the plan provided that upon the confirmation of the plan, the prior foreclosure would be rescinded, putting title to the ranch property back in the hands of Man-Gas and the Ranch Company. The plan required the Manges debtors to implement the plan by conveying that property to the liquidating trust.

The most notable provisions of the plan were those provisions designed to ensure that the liquidating trust would be a non-taxable grantor trust. The apparent intent of Seattle-First and SeaFirst was that the plan follow the contours of the Eleventh Circuit's erroneous decision in *Holywell Corp. v. Smith*, 911 F.2d 1539 (11th Cir. 1990), *rev'd* 112 S. Ct. 1021 (1992). Thus, the plan proposed that the trust not be held liable for any taxes resulting from the sale of the debtors' property. In fact, the plan expressly provided that the trustee was under no duty to file federal tax returns, pay income taxes of any kind, or make trust assets or sale proceeds available to satisfy the tax claims. Instead, the plan expressly provided that the resulting tax liability was to be satisfied by Clinton Manges personally.

Before this Court had reversed the Eleventh Circuit decision in *Holywell Corp. v. Smith*, the bankruptcy court issued an order confirming the creditors' plan.

The Manges debtors appealed from the bankruptcy court's confirmation order, and they asked the bankruptcy court to stay implementation of the plan. The bankruptcy court denied the request. The Manges debtors then asked the district court for a stay, but the district court also declined to stay implementation of the plan. The Manges debtors then sought a writ of mandamus from the court of appeals to compel the district court to issue the stay. The court of appeals denied that request.

Seattle-First and SeaFirst urged the district court to dismiss the appeal as moot, but the district court declined to do so. It concluded that "substantial consummation" of the plan had not yet occurred because the most substantial asset owned by the debtors — the ranch property — had not been sold. On the merits, the district court affirmed the bankruptcy court's confirmation order.

The Manges debtors then appealed to the court of appeals. Two days after filing their notice of appeal, the Manges debtors requested and the district court denied an emergency stay of the district court's order affirming the bankruptcy court's confirmation order. The court of appeals denied a similar motion for stay a week later. Several months after that, and based on discovery obtained in the interim, the Manges debtors filed an amended motion to stay implementation of the plan pending appeal, but the court of appeals denied that motion also.

As a result, numerous transactions occurred during the appeal. The liquidating trustee sold working interests, executed oil & gas leases and gas purchase contracts, and leased the surface estate for grazing and hunting purposes. Before oral argument, the trustee also allegedly sold the ranch property and the remaining mineral interests.

At that point, Seattle-First and SeaFirst urged the court of appeals to dismiss the appeal as moot. In reply, the Manges debtors asked the court to remand the case to the district court for discovery on the mootness issue. The Manges debtors argued that the appellate record did not show whether the buyers of the ranch property had notice of the pending litigation and whether these buyers would be harmed by modification of the plan of reorganization. As such, the Manges debtors asked that they be allowed to conduct discovery to present controverting evidence regarding the mootness issue. The court of appeals denied this request.

In their brief on appeal, the Manges debtors argued that the tax provisions violated this Court's decision in *Holywell Corp v. Smith,* 112 S. Ct. 1021 (1992). In *Holywell* this Court found that the burden of filing tax returns and paying taxes on trust income of a liquidating trust such as this rested upon the trustee rather than on the debtor. At oral argument, in response to questions from the panel, the Manges debtors proposed that at a minimum the court could grant appropriate relief by simply striking the tax provisions in the plan, without rewriting or dismantling the plan. *In re Manges (Manges v. Seattle-First Nat'l Bank*, 29 F.2d 1034, 1043 n.13 (5th Cir. 1994).

Relying primarily on uncontroverted evidence that the trustee had finally sold the ranch property, evidence that the Manges debtors had no effective opportunity to rebut, the court of appeals concluded that substantial consummation of the plan had occurred and that the court therefore was unable to grant any effective relief. The court therefore dismissed the appeal as moot.

ARGUMENT

I. The Fifth Circuit erred in dismissing the appeal on mootness grounds.

The Fifth Circuit's decision to dismiss on mootness grounds was based primarily on the idea that the ranch had been sold and that the court could not fashion any appropriate relief without undoing this sale and several other transactions, action that would result in harm to interests of third parties. This conclusion was wrong because the remedy that the Manges debtors ultimately requested would not require wholesale revision of the plan and would not have adversely affected third parties not before the court. The court could have ordered that the narrow provisions imposing on Manges the tax liability resulting from the trust's sale of property be stricken. Such relief would not have harmed third parties and would have left the sale and the plan intact.

Substantial consummation does not ipso facto moot an appeal of the plan. *See In re Block Shim Dev. Co.,* 939 F.2d 289, 291 (5th Cir. 1991). Substantial consummation will not moot the appeal so long as (1) the court can still order effective relief; (2) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity; (3) such relief will not unravel intricate transactions and thus create an unmanageable situation for the bankruptcy court; (4) the parties who will be adversely affected by modification of the plan receive notice of the appeal and an opportunity to participate in the appeal; and (5) the appellant has pursued with diligence all available remedies to obtain a stay of the implementation of the plan. *See In re Chateaugay Corp. (Frito-Lay, Inc. v. LTV Steel Co.),* 10 F.3d 944, 952-53 (2nd Cir. 1993).

As should be apparent, mootness in this context does not directly implicate classic "case or controversy" concerns of article III of the Constitution. Rather, the concept of "mootness" with regard to consummation of the plan of reorganization addresses equitable concerns unique to bankruptcy. Thus, even if "substantial consummation" means the court can no longer restore all parties to the positions they used to occupy, the case remains live if the court "can fashion some form of meaningful relief." *See, e.g., In re UNR Indus., Inc.*, 20 F.3d 766, 768 (7th Cir. 1994) (citing *Church of Scientology v. United States*, 113 S. Ct. 447, 450 (19[illegible]), *cert. denied sub nom. UNARCO Bloomington Factory Workers v. UNR Indus., Inc.*, 63 U.S.L.W. 3381 (Nov. 14, 1994); *In re 1515 Broadway Assocs., L.P. (New York City Dep't of Fin. v. 1515 Broadway Assocs., L.P.)*, 153 Bankr. 400, 405-06 (S.D.N.Y. 1993). Thus, the reviewing court should evaluate each claim for relief from the plan to determine whether modification of the plan is feasible and equitable. *See, e.g., UNR Indus., Inc.*, 20 F.3d at 768; *Chateaugay*, 10 F.3d at 954; *In re AOV Indus., Inc.*, 792 F.2d 1140, 1147-48 (D.C. Cir.), *vacated in part*, 797 F.2d 1004 (D.C. Cir. 1986); *In re Texaco Inc. (Trans World Airlines, Inc. v. Texaco Inc.)*, 92 Bankr. 38, 46 (S.D.N.Y. 1988).

For example, the court in *AOV Industries* examined separately each request for relief. Although the court determined that many claims were moot, it concluded that two claims were not, despite substantial consummation of the plan. The court noted that all parties that could be affected by these two claims were before the court, and the court's decision would have no adverse impact on the interests of non-party creditors. *AOV Indus.*, 792 F.2d at 1149. In *In re Chateaugay*, the court similarly concluded that substantial consummation of the plan had not mooted

Frito-Lay's claims for indemnity because at least some effective relief could be granted. *See Chateaugay,* 10 F.3d at 952-55. In short, whether the court can fashion any effective relief, without adversely affecting those not involved in the appeal, is the critical issue.

The principal thrust of the Manges debtors' appeal was their objection to the discrete provisions of the plan which imposed on Manges the tax liability arising from the liquidating trustee's sale of the property of the estate — provisions directly contrary to this Court's decision in *Holywell Corp. v. Smith*, 112 S. Ct. 1021 (1992). Thus, in the face of a mootness challenge, the court of appeals had a duty to determine whether it could strike the provisions of the plan shifting this tax liability, without creating an unmanageable situation for the bankruptcy court or third parties affected by this relief.

The court of appeals decided, however, that striking the objectionable portions of the plan was not possible. *In re Manges (Manges v. Seattle-First Nat'l Bank*, 29 F.2d at 1043 n.13. Asserting that the tax provision was integral to the plan as implemented, and reiterating the talisman of "substantial consummation," the court of appeals reasoned that section 1127(b) of the Bankruptcy Code simply would not permit it to grant the limited relief requested. *Id.*

The court's conclusion is wrong for two principal reasons. First, the Manges debtors ultimately limited their request for relief to the striking of limited portions of the plan which would have affected only the parties before the court. Granting this relief would not have upset the plan in its entirety, but would simply have shifted the liability for taxes from Manges to the liquidating trust, where it normally would have been. This would not have affected

the purchasers from the trust, nor would it have affected the unsecured creditors and the fund created to satisfy their claims. Instead, it would only have affected Manges and the appellees, Seattle-First and SeaFirst.

The court's suggestion that the Manges debtors had proposed "piecemeal dismantling" of the plan obscures the court's actual logic. *Id.* The Manges debtors proposed no such "piecemeal dismantling" of the plan. Instead, they suggested the simple removal from the plan of provisions imposing on Manges the tax liability resulting from sale of estate property by the trust. That such relief may have made the plan unpalatable for Seattle-First and SeaFirst would not make the situation unmanageable for the court below. Neither the sale to the third-party purchasers, nor the distributions to unsecured creditors, nor the leases and contracts on the ranch property would need to be undone. Nothing in the opinion suggests that the court of appeals really analyzed whether striking the tax provision would require it to undo any transactions pursuant to the plan.

Second, the court of appeals was wrong in believing section 1127(b) to be applicable in this context. Section 1127(b) does not limit a court of appeals' ability to review the plan for errors that can be corrected without rewriting the entire plan. *See UNR Indus.*, 20 F.3d at 769; *see also In re A.J. Mackay Co. (Bill Roderick Distribution, Inc. v. A.J. Mackay Co.)*, 50 Bankr. 756, 760 (D. Utah 1985). It only addresses the power of the bankruptcy court to modify a plan after confirmation. In short, a reviewing court has the duty to "scrutinize each individual claim, testing the feasibility of granting relief against its potential impact on the reorganization plan as a whole." *AOV Indus., Inc.*, 792 F.2d at 1148. "Substantial consummation is not a blanket discharge of this judicial duty to examine carefully each

request for relief." *Id.* Section 1127(b) thus does not limit the duty of the court of appeals to determine whether the lower courts erred in approving a plan of reorganization or whether appropriate relief is feasible.

Seattle-First and SeaFirst argued that the tax provision was an integral part of the plan and that they would not have agreed to the plan absent the tax provision. However, Seattle-First and SeaFirst proposed the plan. Any adverse consequences resulting from the striking of the tax provision should be borne by the plan proponents. Further, no good faith purchasers or innocent third parties will be affected by removing the tax provision from the plan. Nor will striking the tax provision of the plan require the unraveling of intricate transactions that have already taken place. Seattle-First and SeaFirst are essentially the only beneficiaries of the liquidating trust. Shifting the tax liability from the debtors to the liquidating trust will only affect Seattle-First and SeaFirst. It will not affect any other persons involved in the distribution of the Manges, Man-Gas, and Ranch Company assets.

In short, the Manges debtors satisfied the standard for avoiding a mootness determination. *In re Chateaugay Corp.*, 10 F.3d at 952-53. They showed that the court of appeals could order effective relief without unravelling intricate transactions, that they had diligently pursued a stay, and that all parties affected by such relief were before the court. The court of appeals' decision to dismiss the appeal anyway demonstrates that the court's analysis fails to comport with the standard that other circuits have followed in deciding the mootness issue.

II. The Fifth Circuit should have remanded the Manges debtors' appeal for the limited purpose of conducting discovery on the mootness issue.

At the very least, the court of appeals should have remanded this appeal to the bankruptcy court to permit the Manges debtors to obtain the discovery they needed to challenge the affidavits and documentary evidence offered by Seattle-First and SeaFirst to prove up a bona fide sale of the ranch property.

As part of the mootness/substantial consummation analysis, courts look to see whether the requested relief will affect good faith purchasers or persons who are not parties to the appeal. *See, e.g., Chateaugay,* 10 F.3d at 953. Seattle-First and SeaFirst filed numerous affidavits and documents which purported to show that the ranch had been sold in a good faith transaction. The Manges debtors asked that they be allowed to conduct discovery to examine the evidence offered by Seattle-First and SeaFirst regarding the sale of the ranch, and to gather evidence to determine whether the ranch was sold in good faith. The court of appeals denied this request, yet in its opinion the court criticized the Manges debtors for not having offered evidence to controvert the evidence that Seattle-First and SeaFirst had offered.

Courts of appeals have remanded appellate matters to lower courts while retaining jurisdiction of the appeal in many situations. *See Easley v. University of Michigan Bd. of Regents,* 853 F.2d 1351, 1358 (6th Cir. 1988) (court of appeals remanded for evidentiary determination necessary to decide appeal); *Jason's Foods, Inc. v. Peter Eckrich & Sons, Inc.,* 768 F.2d 189, 190 (7th Cir. 1985) (ordering a remand because the appellate record did not adequately

reflect the existence of diversity jurisdiction); *In re American Ready Mix, Inc. (Lopez v. Behles)*, 14 F.3d 1497, 1500 (10th Cir.) (disputed facts regarding a party's standing may required a remand), *cert. denied*, 115 S. Ct. 77 (1994).

Reviewing courts have also found it necessary to remand cases for additional proceedings while retaining appellate jurisdiction to evaluate mootness issues. *See Huddleston v. Nelson Bunker Hunt Trust Estate,* 102 Bankr. 71, 75-77 (N.D. Tex. 1989). In *Huddleston,* to support a contention that the appeal was moot, appellees sought to supplement the record with affidavits purporting to show the extent to which the plan of reorganization had been implemented. The court recognized that to permit such supplementation would require it to provide the appellant with an opportunity to challenge the affidavits. The court found that "when the controlling evidence [on mootness] is disputed, the better course is to remand the issue to the bankruptcy court to consider any appropriate evidence, to supplement the appellate record accordingly, and to enter findings of fact and conclusions of law." *Huddleston,* 102 Bankr. at 76 (citing *A&S Liquidating Co. v. Carter,* 465 F.2d 359, 360 (5th Cir. 1972); *see In re Hamady Bros. Food Markets (Durant Enters., Inc. v. Creditors Comm.),* 110 Bankr. 815, 818 (E.D. Mich. 1990) (following *Huddleston*).

Indeed, the court of appeals even recognized that problems may arise when the party opposing a motion to dismiss on mootness grounds contests the newly submitted evidence as done by the Manges debtors. *See Manges,* 29 F.3d at 1041. Nonetheless, the court concluded that it could, with impunity, rely upon the documents offered by Seattle-First and SeaFirst, regardless of whether Manges had had an opportunity to contest that testimony. *See id.*

The court should have allowed the Manges debtors to take discovery, because that was the only way to give them any meaningful opportunity to address the mootness issue with respect to the sale of the ranch.

III. Dismissal of the appeal violated due process and "fresh start" considerations.

The court of appeals' decision also merits review by this Court because it is contrary to traditional due process considerations as well as the fresh start principles of the Bankruptcy Code.

After confirmation of a plan of reorganization, a party choosing to challenge the bankruptcy court's order should seek a stay pending appeal to avoid a mootness issue. Consequently, when reviewing courts are asked to determine issues of mootness, they often look to whether the appellant sought the imposition of a stay pending appeal. Several courts have indicated that whether the appellant diligently pursued a stay is an important factor to be considered when deciding mootness issues. *See, e.g., Chateaugay,* 10 F.3d at 954-55; *In re Public Service Co. (Rochman v. Northeast Util. Serv. Group)*, 963 F.2d 469, 472 (1st Cir.), *cert. denied*, 113 S. Ct. 304 (1992); *Block Shim,* 939 F.2d at 291; *In re Roberts Farms, Inc. (Trone v. Roberts Farms, Inc.)*, 652 F.2d 793, 798 (9th Cir. 1981); *Hamady Bros.,* 110 Bankr. at 817-18; *In re Texaco*, 92 Bankr. at 45. The failure to secure a stay, however, is not dispositive of the mootness issue. *AOV Indus, Inc.,* 792 F.2d at 1147.

In this case, the Manges debtors sought at every available opportunity the imposition of a stay pending the outcome of this appeal. At each turn, the stay was denied. Nevertheless, the appeal was dismissed for the very reason the stays were sought, i.e., to avoid a dismissal on grounds of mootness. While stays are routinely denied and appeals dismissed as moot, this case may demonstrate more clearly than most the inequitable results of such a practice. It strikes at the heart of due process considerations in that it effectively denies parties the right to appellate review.

The idea of due process arises from the American ideal of fairness. *See generally Bolling v. Sharpe,* 347 U.S. 497, 499 (1954); *Peterson v. Garvey Elevators, Inc.,* 850 P.2d 893, 897 (Kan. 1993). Under circumstances such as this appeal, those who diligently pursue a stay at every step will be at the mercy of those implementing the bankruptcy plan. Thus, parties who diligently pursue the imposition of a stay will be in no better position than a party who made no effort to secure a stay. These parties will (1) be unable to stop the implementation and/or subsequent substantial consummation of a confirmed plan, (2) inevitably have the case dismissed for mootness, and (3) routinely be denied appellate review, just like the Manges debtors.

This Court has recognized that in certain instances appellate review is necessary despite mootness when the case is "capable of repetition yet evading review." *See Southern Pac. Terminal Co. v. ICC,* 219 U.S. 498, 515 (1911). The creation of the "capable of repetition yet evading review" exception was necessary to avoid the harsh consequences flowing from dismissal on mootness grounds in situations where the appellant had no control over the existence of a live controversy. This case and others like it warrant the creation of a similar exception. Be they

debtors or creditors, neither party will be able to challenge the erroneous confirmation of a reorganization plan if the courts can deny reasonable requests for a stay and allow substantial consummation to moot the appeal. Debtors, like Manges, will therefore emerge from the bankruptcy proceeding having been denied their right to appellate review, a right that should be guaranteed pursuant to the due process clause of the Fourteenth Amendment.

In addition to this denial of due process, debtors like Manges will not emerge from bankruptcy with a "fresh start," but instead with hundreds of thousands of dollars in tax liability. One fundamental purpose of a bankruptcy proceeding is to afford the debtor a "fresh start." *In re Riso (Snoke v. Riso)*, 978 F.2d 1151, 1154 (9th Cir. 1992). While a debtor's right to a fresh start must be balanced against a creditor's right to be paid, the Bankruptcy Code intends that the debtor emerge free of debt following the bankruptcy proceeding, and with enough property to begin again. *See In re Grosso,* 51 Bankr. 266, 269-70 (Bankr. D.N.M. 1984). When these two principles conflict, the interest in providing the debtor with a fresh start rarely takes the back seat. *See id.* at 270. Accordingly, Seattle-First and SeaFirst, the plan's proponents, should bear the risk of an erroneous confirmation by the bankruptcy court.

In this case, the court of appeals ignored the fresh start policy and the due process issues raised by this case. The courts' denials of the Manges debtors' requests for a stay, and the court of appeals' ultimate dismissal of this appeal as moot, combine to effect a fundamental violation of due process. Neither the Bankruptcy Code nor the federal courts' equitable doctrine of mootness should be construed to allow such results.

CONCLUSION

For these reasons, this Court should grant this petition for writ of certiorari.

Respectfully submitted,

Deirdre Ruckman
Stacy R. Obenhaus*
GARDERE & WYNNE
3000 Thanksgiving Tower
Dallas, Texas 75201
(214) 999-3000

Attorneys for Petitioner
*Counsel of Record